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RECEIVED

Of Counsel

2003 JUN 11 PM 12:29

H. LaDon Baltimore

T.R.A. DOCKET ROOM

June 11, 2003

Tennessee Regulatory Authority  
Attn: Sharla Dillon  
460 James Robertson Parkway  
Nashville, TN 37238

**Via Hand Delivery**

Re: Complaint of Citizens Telecommunications Company of Tennessee, L.L.C. against  
Ben Lomand Communications, Inc.; Docket No. 03-00331

Dear Ms. Dillon:

Enclosed for filing please find the original and fourteen (14) copies of the Answer and Motion to Dismiss of Ben Lomand Communications, Inc. in the above-referenced matter. Please do not hesitate to contact me if you have questions or if we need to discuss this.

Sincerely,



H. LaDon Baltimore  
Ben Lomand Communications, Inc.

LDB/dcg

Enclosures

cc: Guilford F. Thornton, Jr., Esq.  
Levoy Knowles

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

<b>IN RE:</b>	)	
	)	
<b>COMPLAINT OF CITIZENS</b>	)	
<b>TELECOMMUNICATIONS COMPANY</b>	)	
<b>OF TENNESSEE, L.L.C.,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>Against</b>	)	<b>DOCKET NO. 03-00331</b>
	)	
<b>BEN LOMAND COMMUNICATIONS,</b>	)	
<b>INC.,</b>	)	
	)	
<b>Respondent.</b>	)	

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**ANSWER AND MOTION TO DISMISS  
OF BEN LOMAND COMMUNICATIONS, INC.**

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Ben Lomand Communications, Inc. ("Ben Lomand") files this answer and motion to dismiss to the complaint of Citizens Telecommunications Company of Tennessee, L.L.C. ("Citizens") in this matter. Ben Lomand objects to Citizens' petition as being without justification, either procedurally or substantively. Ben Lomand requests that the Tennessee Regulatory Authority ("TRA") dismiss the complaint without convening a contested case. In support of this answer and motion to dismiss, Ben Lomand states as follows:

**I. THE PARTIES**

1. Ben Lomand is a diversified telecommunications company, duly certified to do business in the State of Tennessee by the TRA through the grant of a certificate of convenience and necessity and by franchises from the subject cities to furnish local exchange telecommunications, primarily telephone services, in the cities of McMinnville and Sparta.

2. Citizens is an incumbent local exchange company ("ILEC") as defined in Tenn. Code Ann. § 65-4-101, serving customers in the White County/Sparta, Warren County/McMinnville, Weakley County, Putnam County, and Cumberland County exchanges.

3. Citizens also conducts business as "d/b/a Frontier Communications of Tennessee" ("Frontier"). While it is referred to as Citizens Telecommunications Company of Tennessee, L.L.C. in the filings in this docket, petitioner uses "Frontier" in McMinnville and Sparta on billboards, service vehicles, and buildings.

## **II. FACTUAL BACKGROUND**

1. Citizens (d/b/a Frontier) filed a tariff on April 11, 2002 to offer two new services to business customers in McMinnville and Sparta. The business flat rate is a term offering starting at six months which gives Frontier's business customers rate reductions in return for term commitments. There are also additional discounts with certain bundled service. This special tariff applies to customers in the McMinnville and Sparta exchanges only. Citizens/Frontier did not offer the same tariff to its customers located in the Weakley County, Putnam County, and Cumberland County exchanges.

2. On April 23, 2003, Ben Lomand filed a complaint alleging, among several grounds, that Citizens has engaged, and continues to engage, in anti-competitive and predatory practices in violation of state law and orders of the TRA. That matter is under consideration by the TRA in Docket No. 02-01221.

3. On March 18, 2003, Citizens filed a petition with the TRA asking for relief from the price floor under Tenn. Code Ann. § 65-5-208(c). Ben Lomand filed a petition to intervene

and motion to dismiss the petition. That matter is under consideration by the TRA in Docket No. 03-00211.

4. On May 9, 2003, Citizens filed a complaint against Ben Lomand initiating this matter. Citizens alleges unauthorized special promotions and wrongful use and misappropriation of Citizens' drop wire and house cabling.

### **III. LEGAL ANALYSIS AND ARGUMENT**

#### **A. Ben Lomand denies that it has offered unauthorized special promotions.**

1. Citizens, in paragraphs 5 through 9 of its complaint, sets forth TRA rules and Tennessee Code Annotated statutes. The statutes and rules speak for themselves and no response is required from Ben Lomand. To the extent that paragraphs 5 through 9 may be considered to contain allegations, Ben Lomand denies the allegations.

2. In paragraph 10 of its complaint, Citizens alleges that Ben Lomand has been offering special promotions in violation of the rules and statutes referenced in paragraphs 5 through 9 of its complaint, and alleges that such conduct is violation of such statutes and rules and is anti-competitive. Citizens fails to provide sufficient facts to support the allegations, and thus Ben Lomand is unable to provide a response to the allegations. Accordingly, Ben Lomand denies these allegations.

3. As a further response, as to the alleged violation by Ben Lomand of unspecified acts, Ben Lomand moves for a more definitive statement of the facts and circumstances supporting Citizens' allegation in order that Ben Lomand may provide a response. In the alternative, Ben Lomand moves that the allegation be stricken since it fails to state a cause of action and because it fails to state a claim on which relief can be granted.

4. Ben Lomand denies the allegations of paragraph 10 of the complaint and demands strict proof thereof. Furthermore, Ben Lomand additionally responds by stating that, to the best of its knowledge, information, and belief, Ben Lomand has followed all TRA rules and Tennessee Code Annotated statutes requiring tariff filings and information filings. Attached as Exhibit 1 are selected filings by Ben Lomand with the TRA. As set forth in paragraphs 2 and 3 of this answer, Citizens has failed to provide sufficient facts to support the allegations, and thus Ben Lomand is unable to specifically respond to the allegations.

5. As a further response to paragraph 10 of the complaint, Ben Lomand denies that it has engaged in any anti-competitive practice. The complaint is defective in that it does not cite the statute regarding anti-competitive practices, Tenn. Code Ann. § 65-5-208(c). Anti-competitive practices are generally related to predatory pricing, price squeezing, and price discrimination. None of this has been alleged in the complaint. What is alleged here is the violation of tariff filing rules and Tenn. Code Ann. § 65-4-122 which prohibits unjustly discriminatory and/or preferential rates. While Ben Lomand vigorously denies that it is in violation of the above-referenced statutes and rules, the lack of such filing would not be anti-competitive. The only law violated would be the filing requirement of Tenn. Code Ann. § 65-4-122 and TRA rules, not anti-competition laws.<sup>1</sup>

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<sup>1</sup> While there are no Tennessee cases on point, cases discussing the anti-competitive aspects of the Tennessee Petroleum Trade Practices Act state that there must be an element of predatory intent and other factors such as cost, prices, profits, consumer choices, and barriers to entry. See Ghem, Inc. v. Mapco Petro, Inc., 767 F.Supp. 1418 (M.D. Tenn. 1990) and Kerr v. Hackney Petroleum Tenn., Inc., 775 S.W.2d 600 (Tenn. Ct. App. 1989).

**B. Ben Lomand denies that it has engaged in the wrongful use and misappropriation of Citizens' drop wire and house cabling.**

6. In paragraph 11 of its complaint, Citizens refers to certain provisions in the Tennessee Code Annotated and quotes a portion of one of the provisions dealing with unlawful damage to telephone facilities. The statutory provisions speak for themselves, and no response is required from Ben Lomand. To the extent this paragraph may be considered to contain allegations, Ben Lomand denies the allegations. Ben Lomand specifically denies any implication that it intentionally damaged Citizens' facilities and references paragraph 7 below.

7. In paragraph 12 of its complaint, Citizens alleges that Ben Lomand has used drop wire and cabling owned by Citizens to provide services to Citizens' former customers that Ben Lomand has taken from Citizens without contractual written or oral permission from Citizens. Citizens alleges that Ben Lomand refused to correct the situation or address any of Citizens' property rights. Ben Lomand specifically denies all allegations contained in paragraph 12 of the complaint. To the best of its knowledge, information, and belief, Ben Lomand has addressed any and all concerns that Citizens has raised regarding such allegations. Attached as Exhibit 2 is a letter dated May 22, 2002 from Mr. Stephen G. Kraskin, an attorney writing to Citizens on behalf of Ben Lomand, stating that Ben Lomand was addressing the perceived complaints and asked for any further communications from Citizens if Citizens allegations and claims had not been addressed. To date, no response has been received from Citizens, and such letter was written more than one year ago.

8 (A). Other than reference to a date (March 14, 2002), Citizens does not specify what acts it is alleging are wrongful. Therefore, Ben Lomand moves that the allegation be stricken

since it fails to state a cause of action and since it fails to state a claim upon which relief can be granted. In the alternative, Ben Lomand moves for a more definitive statement of the facts and circumstances supporting Citizens' allegation in paragraph 12 of the complaint in order that it may provide a response.

8(B). Ben Lomand raises the issue that Citizens has filed this complaint in response to Ben Lomand's complaint ( Docket No. 02-01221). Citizens alleges an act that occurred more than one year (March 14, 2002) before the complaint was filed. If the matter was so onerous, why was the complaint not filed earlier? Why wait until Ben Lomand filed a complaint? *See also*, paragraph 7 of this answer stating that Citizens ignored Ben Lomand's efforts to solve any perceived problems.

9. In paragraphs 13 and 14 of its complaint, Citizens argues that Ben Lomand's actions constitute unlawful trespass, conversion, unfair competition, and a violation of Tenn. Code Ann. § 65-21-110. In response, Ben Lomand incorporates its responses to paragraphs 11 and 12 of the complaint (paragraphs 6 through 8 of this answer). Furthermore, Ben Lomand specifically denies that it has violated Tenn. Code Ann. § 65-21-110 or that it has engaged in unlawful trespass, conversion, and unfair competition. Ben Lomand also specifically denies that it knowingly continues to use Citizens' property to service Ben Lomand's customers, and will show that it has used its own property to service its customers.

10. As a further response to paragraphs 11 through 14 of the complaint, Ben Lomand would show that it has installed its own property to service its customers. Further, drop wire, house cabling, and entrance cabling have been installed as of the date of this answer.

11. As an additional response to paragraphs 11 through 14 of the complaint, Ben Lomand would show the difficulty inherent in denoting the demarcation or customer interface point which was installed at one customer premises, the Three Star Mall. Again, due to the lack of specificity in the complaint, Ben Lomand is unsure whether this is the location which is the subject of this complaint.

12. In response to Citizens' requests for relief, Ben Lomand denies that Citizens is entitled to any of the relief sought.

**C. Citizens has misappropriated and used the property of Ben Lomand.**

13. Citizens has cut over the drop wire, cut off Ben Lomand's customers, and used Ben Lomand's property, including cable, to service Citizens' own customers in violation of Tenn. Code Ann. §§ 65-21-110 and 65-35-102 which prohibit damage to equipment and to interfere with service. For example, Citizens is using Ben Lomand's cable to the office of the McMinnville City Codes. In addition, Citizens is using Ben Lomand's buried service drop at the Cotton Apartments.

14. Ben Lomand reserves the right to amend its answer to show that Citizens has engaged in other activities which impede Ben Lomand's ability to serve its customers.

**IV. AFFIRMATIVE DEFENSES AND MOTIONS**

**A. Pursuant to TRA Rules 1220-1-2.03(2) and (3), Ben Lomand has included in the above answers to the complaint motions raising the following defenses.**

15. In paragraphs 3, 8, and 9 of Ben Lomand's answer to the complaint, Ben Lomand moves to dismiss the allegations on the grounds that the allegations fail to state a cause of action or fail to state a claim upon which relief may be granted.




16. In paragraphs 3, 8, and 9 of Ben Lomand's answer to the complaint, Ben Lomand points out that Citizens fails to provide sufficient facts to support the allegations, and thus Ben Lomand is unable to provide a response to the allegations. TRA Rule 1220-1-2-.09(1)(c) requires that a formal complaint must "set forth with specificity the factual basis and legal grounds upon which the complaint is based," and subsection (e) requires that a complaint must enumerate each statute violated in **each fact** demonstrating a violation. Accordingly, pursuant to Rule 1220-1-2-.03(4), Ben Lomand moves for a more definite statement of the facts and circumstances supporting Citizens' allegations in the above-noted paragraphs in order that Ben Lomand may provide a response.

#### **V. REQUEST FOR RELIEF**

WHEREFORE, Ben Lomand respectfully requests that the TRA:

1. Dismiss the complaint filed by Citizens and decline to convene a contested case;
2. Compel Citizens to refrain from interfering with Ben Lomand's customers;
3. Impose appropriate sanctions for any violation of statutes, rules, and orders of the TRA by Citizens;
4. Award Ben Lomand damages as a result of the alleged conduct by Citizens, if appropriate; and
5. Grant such other and further relief to which Ben Lomand may be entitled, including damages, reasonable attorney's fees, and costs.

Respectfully submitted,



H. LaDon Baltimore, BPR #003836

**FARRAR & BATES, L.L.P.**

211 Seventh Avenue North, Suite 420

Nashville, TN 37219

(615) 254-3060

(615) 254-9835 FAX

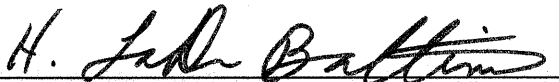
*Counsel for Ben Lomand Communications, Inc.*

**Certificate of Service**

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via facsimile transmission, overnight delivery, or U. S. Mail, first class postage prepaid, to the following, this 11<sup>th</sup> day of June, 2003.

Guilford F. Thronton, Jr., Esq.  
Stokes, Bartholomew, Evans & Petree  
424 Church Street, Suite 2800  
Nashville, TN 37219

Richard Collier, Esq.  
General Counsel  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238



H. LaDon Baltimore



RECEIVED

September 11, 2002

SEP 16 2002

TN REGULATORY AUTHORITY  
TELECOMMUNICATIONS DIVISION

COPY

Mr. David Foster  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243

02-213

Subject: Revision to Local Service Tariff No. 1 CLEC Informational Tariff  
Ben Lomand Communications, Inc. dba BLC, INC.

Dear Mr. Foster:

Enclosed are an original and three copies of the subject tariff revision for review and approval.

The revision provides for a change in text regarding the number of lines a business must have in order to receive the \$20 per month business rate. The current terminology indicates that twenty (20) lines is the minimum.

We find that the majority of our business customers have less than 20 lines. By reducing the minimum number of lines from twenty (20) to ten (10), more customers would be eligible for this rate.

An additional copy of this letter is also enclosed. Please date stamp and return it in the enclosed stamped, self-addressed envelope.

If you have any questions relative to these tariff revisions, please call Levoy Knowles at (931) 473-2517 or me at (931) 668-6601.

Sincerely,

A handwritten signature in cursive script that reads "Judy G. Kelsey".

Judy G. Kelsey  
Operations Manager  
Enclosures (4)  
CC: Levoy Knowles

EXHIBIT

tabbies

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**TENNESSEE REGULATORY AUTHORITY**

Sara Kyle, Chairman  
Deborah Taylor Tate, Director  
Pat Miller, Director  
Ron Jones, Director



460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

September 23, 2002

Ms. Judy G. Kelsey  
Operations Manager  
Ben Lomand Communications  
P.O. Box 638  
McMinnville, TN 37111

Dear Ms. Kelsey:  
**Re: Docket 2002-213**

This is to acknowledge your tariff filing of September 11, 2002 providing a tariff page to the Local Exchange Services Tariff listed below. This tariff filing Makes Text Change.

This tariff is accepted as an information tariff and will become effective in accordance with TRA Rule 1220-4-8-.07.

**LOCAL EXCHANGE SERVICES TARIFF**

Section 3:      **TRA. No.1:**  
                    **Second Revised Page 41**

Sincerely,

David Foster  
Regulatory Manager

DF/ct

Enclosures (1)

**BLC****COPY****RECEIVED**~~September 11, 2002~~

MAR 25 2003

Mr. David Foster  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243

Subject: Revision to Local Service Tariff No. 1 CLEC Informational Tariff  
Ben Lomand Communications, Inc. dba BLC, INC.

Dear Mr. Foster:

Enclosed are an original and three copies of the subject tariff revisions for review and approval.

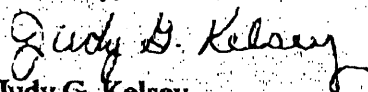
The revision provides for a text change in Section 3.1.2.3.2 "Local Exchange Service, Recurring Charges" regarding the number of lines a business must have in order to receive the \$20 rate. The current terminology indicates that two (2) lines is the minimum.

Our Board of Directors has voted to remove the minimum number of lines in order to allow all business customers to take advantage of the rate with a 12 Month Term Agreement.

An additional copy of this letter is also enclosed. Please date stamp and return it in the enclosed stamped, self-addressed envelope.

If you have any questions relative to these tariff revisions, please call me at (931) 668-6601.

Sincerely,



Judy G. Kelsey  
Operations Manager  
Enclosures (5)  
CC: Levoy Knowles

**BEN LOMAND COMMUNICATIONS, INC.**

1111 New Smithville Highway • P. O. Box 638 • McMinnville, Tennessee 37111

## TENNESSEE REGULATORY AUTHORITY



Sara Kyle, Chairman  
Deborah Taylor Tate, Director  
Pat Miller, Director  
Ron Jones, Director

460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

March 26, 2003

Ms. Judy G. Kelsey  
Operations Manager  
Ben Lomand Communications  
1111 Smithville Hwy.  
McMinnville, TN 37111

Dear Ms. Kelsey:  
**Re: Tariff No. 2003-273**

This is to acknowledge your tariff filing of March 25, 2003 providing tariff pages to the Local Exchange Services Tariff listed below. This tariff Provides Text Change.

This tariff is accepted as an information tariff and will become effective in accordance with TRA Rule 1220-4-8-.07.

**LOCAL EXCHANGE SERVICES TARIFF**

Check Sheet: 5<sup>th</sup> Revised Page 1  
TRA No. 1: 4<sup>th</sup> Revised Page 41

Sincerely,

A handwritten signature in cursive script that reads "Darlene Standley".

Darlene Standley  
Deputy Chief, Telecommunications

DS/ct

Enclosures (1)

KRASKIN, LESSE & COSSON, LLP  
ATTORNEYS AT LAW  
2120 L Street, N.W., Suite 520  
Washington, D.C. 20037

TELEPHONE (202) 296-8890

TELECOPIER (202) 296-8893

May 22, 2002

Mr. Gregg C. Sayre  
Associate General Counsel  
Frontier  
180 South Clinton Avenue  
Rochester, N.Y. 14646-0700

Dear Gregg:

This letter is written on behalf of Ben Lomand Communications, Inc. ("BLC") and follows-up both the correspondence you sent to BLC on May 2, 2002 and my voice mail message to you. At the outset, I want to reiterate what I indicated to you in my phone message: BLC has not willfully or intentionally utilized any facility or property of Citizens in any manner that is inconsistent with the terms and conditions of the existing interconnection agreement between the companies and all applicable rules, regulations, and law.

The claims of wrong-doing made against BLC by local staff members of Citizens prompted an internal review of all related service provisions by BLC to ensure that the practices and actions of BLC staff and service representatives were not in error. Your letter to BLC prompted a call to our office to review and discuss the relevant FCC rule sections regarding demarcation points in a multiunit premise within the context of the serious allegations raised by Citizens. In connection with that discussion, we also reviewed and discussed with BLC § 3.5.10 of the interconnection agreement between BLC and Citizens ("Access to the Network Interface Device").

During our discussion of this matter, the representatives of BLC presented the factual scenarios related to the specific instances that were the subject of the claims raised by Citizens' staff in their calls to BLC. Based on our understanding of the facts, the applicable FCC rules and the effective interconnection agreement, we are convinced that BLC's practices and actions are in compliance with all applicable rules, regulations and law. Nonetheless, both BLC and we agree that we may be unintentionally mistaken or unaware of a fact that would change our analysis.

EXHIBIT

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Page 2

BLC believes, however, that the claims and allegations that have been made by your company's local staff are most likely reflective of the competitive pressures on individual operating personnel who may not be fully familiar with the applicable FCC rules and the relevant sections of the interconnection agreement. BLC staff representatives believe that the allegations and claims made by Citizens constitute harassment intended to distract BLC's resources from its competitive endeavor. Accordingly BLC respectfully asks that you review the matter with your staff and provide a description of any specific circumstance where, after your review, you still believe that BLC has in any way acted contrary to applicable rules, regulations, law and the pertinent sections of the interconnection agreement between the parties.

In the event that BLC is incorrect in its analysis in any way or with respect to any instance, BLC stands ready, willing and able to act promptly to remedy any specific concern brought to its attention. Please let me know at your convenience the results of your review in order that we might discuss how best to resolve this matter between BLC and Citizens fully and in a mutually satisfactory manner without the necessity of formal processes, if possible.

Sincerely,



Stephen G. Kraskin

cc: Mr. Levoy Knowles